Supreme Court, U.S.
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No. 91-1334

In The

Supreme Court Of The United States

OCTOBER TERM, 1991

LAKE COUNTRY, INC.,

Petitioner,

v.

LEROY OLSEN and CHERYL OLSEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF QUESTIONS PRESENTED

1. Is An Entity That Buys And Sells Multiple Lots Within A Twelve Year Old Completed Subdivision A "Developer" Within The Meaning Of The Interstate Land Sales Full Disclosure Act 15 U.S.C. Section 1701 et seq.?

2. Does A Television Advertisement Which Contains An Inducement To Visit The Subdivision Disqualify A Developer From The Single-Family Residence Exemption Afforded By The Act, 15 U.S.C. Section 1702(b)(5)?

II. PARTIES

The parties to this Petition are:

- **LAKE COUNTRY, INC.**, Petitioner
- Leroy Olsen and Cheryl Olsen, Respondents.

LAKE COUNTRY, INC. does not have a parent corporation or any non-wholly owned subsidiaries.

Parties in the Courts below were:

- **LAKE COUNTRY, INC.**
- Leroy Olsen and Cheryl Olsen
- Cost Control Marketing and Sales Management of Virginia, Inc.
- Northeastern Bank of Pennsylvania, N.A.
- Cost Control Marketing and Management, Inc.
- Hugh Boyle

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LEROY OLSEN and CHERYL OLSEN

v.

LAKE COUNTRY, INC., Petitioner

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

LAKE COUNTRY, INC., Petitioner, by Francis T. Eck, Esquire, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

V. OPINIONS IN THE COURTS BELOW

On April 30, 1990, in the case of Leroy Olsen and Cheryl Olsen v. **LAKE COUNTRY, INC.**, et al., the United States District Court for the Eastern District of Virginia denied Petitioner, **LAKE COUNTRY, INC.'S** Motion for Summary Judgment in a ruling from the bench holding that **LAKE COUNTRY, INC.** was a "developer" within the meaning of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. Section 1701(5). The Court's Order on this, and other issues, was entered on May 2, 1990. (App. p. 1).

By Memorandum Opinion and Order dated June 20, 1990, the United States District Court for the Eastern District of Virginia granted the Olsen's Motion

for Summary Judgment as to **LAKE COUNTRY, INC.** restating its earlier ruling that Petitioner was a "developer" subject to the Interstate Land Sales Full Disclosure Act and further finding that Petitioner was not exempt under the Single-Family Residence Exemption contained in 15 U.S.C. Section 1702(b)(5). (App. p. 3).

On August 2, 1990, the District Court entered its final Order in this case awarding the Olsens stipulated nominal damages of $1,500.00 and attorney's fees and costs in the amount of $10,500.00. (App. p. 27).

An Appeal was noted to the United States Court of Appeals for the Fourth Circuit on August 20, 1990. (App. p. 30). The Appeal was argued on March 5, 1991.

On November 18, 1991, the United States Court of Appeals issued its opinion affirming the Orders of the District Court on both issues, ruling that Petitioner was a developer within the meaning of 15 U.S.C. Section 1701(5) and that Petitioner did not qualify for the Single-Family Residence Exemption afforded by 15 U.S.C. Section 1702(b)(5). (App. p. 32).

VI. JURISDICTIONAL STATEMENT

Petitioner, **LAKE COUNTRY, INC.**, seeks this Court's review of the judgment entered on November 18, 1991, by the United States Court of Appeals for the Fourth Circuit, by Petition for a Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. Section 1254(1).

This Petition is timely filed because it was mailed within 90 days of November 18, 1991. Rules 13.1 and 29.2.

VII. STATUTES AND REGULATIONS INVOLVED

15 U.S.C. Section 1701(5):

> "Developer" means any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision.

15 U.S.C. Section 1702(b)(5)(G):

> there are no offers, by direct mail or telephone solicitation, of gifts, trips, dinners, or other such promotional techniques to induce prospective purchasers or lessees to visit the subdivision or to purchase or lease a lot.

24 C.F.R. Section 1710(b)(2):

> In the promotion of a subdivision there must be no offers, by direct mail or telephone solicitation, of gifts, trips, dinners, or use of similar promotional techniques to

> induce prospective purchasers to visit the subdivision or to purchase a lot.

24 C.F.R. Section 1710, Appendix A, Part V, (e)(2)(ii)

> In the promotion of the subdivision, there cannot be offers, by direct mail or telephone solicitation, of gifts, trips, or dinners or the use of similar promotional techniques to induce prospective purchasers to visit the subdivision or to purchase a lot. There is no prohibition against using the mails, telephone, or other advertising media to promote or advertise the offering or to respond to inquiries from potential purchasers. The only prohibition is that these media cannot contain offers of gifts, trips, dinners, or other inducement.

VIII. STATEMENT OF THE CASE

The United States District Court for the Eastern District of Virginia denied Petitioner's Motion for Summary Judgment

and entered summary judgment against Petitioner ruling that Petitioner, **LAKE COUNTRY, INC.** was a "developer" within the meaning of 15 U.S.C. Section 1701(5) in its sale of Lot B-427 to Respondents, thus subject to the registration and disclosure requirements of the Interstate Land Sales Full Disclosure Act, (hereinafter the "**ACT**"). 15 U.S.C. Sections 1701-1720. The District court further ruled that as a "developer", Petitioner did not qualify for the Single-Family Residence Exemption afforded by Section 1702(b)(5) of the **ACT** in the sale of Lot B-427 because Petitioner promoted its vacant lots through a television advertisement which contained an inducement for prospective

purchasers to visit the subdivision. Jurisdiction was based on 28 U.S.C. Section 1331 and 15 U.S.C. Section 1719.

Stipulated nominal damages of $1,500.00 and $10,500.00 in costs and attorney's fees were awarded to the Olsens by Order dated August 2, 1990.

The United States Court of Appeals affirmed the District Court's rulings on both issues by opinion dated November 18, 1991.

It has been the position of **LAKE COUNTRY, INC.** throughout all of these proceedings that it was not a developer within the meaning of the **ACT** in the sale of Lot B-427 to Respondents and further that the sale was exempt pursuant to the

Single-Family Residence Exemption afforded by the **ACT**.

Lake Land'Or Subdivision is comprised of approximately 2,400 lots divided by Virginia State Route 639 into the "Land'Or" and the "Heritage" Sections. Those lots in the Heritage Section are serviced with central sewer and are denoted with the prefix "B". Lots within the Land'Or Section have no prefix designation and are served with individual septic tank systems. Lots in both Sections are serviced with central water.

Lake Land'Or Subdivision was developed by Lake Land'Or , Inc. ("Land'Or, Inc.), beginning in 1971. Land'Or, Inc. registered with the

Department of Housing and Urban Development (HUD) by filing a Statement of Record as required by the Interstate Land Sales Full Disclosure Act ("ACT"), and thereafter complied with its various other mandates. Land'Or, Inc. exclusively designed, built, and paid for all roads, the water and utility systems, the 17 lakes, 2 clubhouses, other recreational facilities, and caused the subdivision plats to be prepared and recorded.

By the end of 1976, Land'Or, Inc. concluded the construction of the Subdivision. Sales of lots terminated. All amenities and private roads were conveyed without charge to Lake Land'Or Property Owners' Association in 1976.

Approximately 2,300 of its 2,383 lots had been sold by the end of 1976.

For all purposes, by January, 1977 the Subdivision had been completely constructed and sold out. Shortly thereafter, Land'Or, Inc. placed its HUD registration of the Subdivision in suspension.

Eleven and one-half years later, in mid-summer 1988, Petitioner, **LAKE COUNTRY, INC.** (hereinafter "**LAKE**"), began to purchase lots in the Lake Land'Or Subdivision in order to inventory and market them to the general public. Between May, 1988 and December, 1989, **LAKE COUNTRY, INC.** purchased 349 vacant lots. Between December 21, 1988, and February 15, 1990, **LAKE COUNTRY, INC.**

sold 120 of these lots. In virtually every instance where **LAKE** purchased a lot at Lake Land'Or, it has not performed any construction, made any improvements, or caused the replatting of any lots. **LAKE** did no more than purchase and resell vacant lots within the existing subdivision.

Mr. and Mrs. Olsen first learned of the Subdivision through a television advertisement promoting Roxbury Homes in the Fredericksburg, Virginia area. They saw the advertisement while in their apartment in Chantilly, Virginia. The television advertisement provided an "800" number to call and offered a $35.00 voucher redeemable at the Subdivision. Respondents called the toll-free number,

their call was returned, and an appointment made. A $35.00 voucher was sent to the Olsens by mail along with confirmation of their appointment. The voucher was redeemed by The Olsens on May 13, 1989, the day they purchased Lot B-427.

In the sale of Lot B-427 to the Olsens, **LAKE** did not have the lot registered with HUD, no Statement of Record had been filed, and no Property Report was given the purchasers.

Since the purchase of their lot on May 13, 1989, Mr. and Mrs. Olsen have constructed a single-family residence on Lot B-427 which has been their primary home since May 14, 1990. The Olsens did not seek rescission for the alleged

violation of the **ACT** but rather they stipulated to an award of $1,500.00 in nominal damages and an additional $10,500.00 representing attorney's fees and costs.

IX. REASONS RELIED ON FOR GRANTING THE WRIT OF CERTIORARI

A. The "Second Generation Seller" Or "Second Developer" Of Lots Within A Subdivision That Was Completed Twelve Years Prior Is Not A Developer Within The Meaning Of 15 U.S.C. Section 1701(5).

The Interstate Land Sales Full Disclosure ACT was not designed to regulate the subsequent sale of lots within a subdivision completed almost twelve years earlier. The legislative history of the **ACT** makes clear that the

ACT was designed to regulate the original developers of unimproved land.

As an unfortunate consequence of the growth of resort and retirement communities in the late 1960's, Congress became aware of gross abuses by promoters of undeveloped land.

> Many people, including our Nation's senior citizens, have purchased property in response to false and misleading promises regarding the nature of the land and the type of community in which it would be located. As a result, they have suffered financial losses, which in many instances amounted to their entire life savings...
>
> The proposal of the committee would authorize the Secretary of Housing and Urban Development to require such disclosures. By so doing, the public is protected as is the responsible developer.

Report of the Committee on Banking and Currency, U.S. Senate, Sen. Rep. No. 1123, 90th Congress, 2d Sess. at 109, U.S. Code Cong. and Admin. News 1968, page 2873. (Emphasis Added).

The Interstate Land Sales Full Disclosure Act ("**ACT**"), was passed by Congress as Title XIV of the Housing and Urban Development Act of 1968 and became effective on April 28, 1969. (Public Law No. 90-448, 82 Stat. 476). The **ACT**, as amended, is codified at 15 U.S.C. §1701 et seq.

The **ACT** imposed a comprehensive federal regulatory framework upon the real estate development industry. It was passed in 1968 to prevent "false and deceptive practices in the sale of

unimproved tracts of land by requiring developers to disclose information needed by potential buyers." Anders v. Dakota Land and Development Co., Inc., 380 N.W.2d 862, 865 (Minn. App. 1986); Flint Ridge Development Co. v. Scenic Rivers Association of Oklahoma, 426 U.S. 776, 778, 96 S.Ct. 2430, 2433, 49 L.Ed.2d 205(1976).

The **ACT** is aimed at "get rich quick promoters" who bilked purchasers, particularly the elderly, out of millions of dollars in the early 1960's. Cumberland Capital Corporation v. Patricia R. Harris, Secretary of Housing and Urban Development, et al., 621 F.2d 246, 250 (6th Cir. 1980). The situation that the **ACT** is designed to prevent is

aptly described in McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975):

> The 'developer' of a land sale plan is usually a corporate entity which, in a fraudulent scheme . . . , ends up defunct and offers no reserve for recovery to those persons defrauded; so, too, the end selling agent, when the development collapses financially, is often long gone or cannot respond pecuniarily.

Id. at 207. "To be meaningful, the basic protection of the **ACT** must be leveled against the fraudulent planners and profit makers for otherwise, the **ACT** would be pragmatically barren." Id. (Emphasis Added).

The legislative intent in passing the **ACT** was to advise potential buyers, in writing, what the developer promised for a subdivision upon its completion.

The **ACT's** remedial measures afford purchasers recourse should the developer fail to complete the development as represented at the time of purchase.

Obviously, the **ACT** has a prospective view; the potential buyer does not need disclosure of the features of a completed development, for the subdivision in place speaks for itself. The **ACT'S** focus was to advise the potential buyer of what the developer promised in an incomplete subdivision.

It is an ancient maxim of statutory interpretation that the old law, the mischief, and the remedy must be considered and the statute should be given an interpretation which will prevent the mischief and promote the

remedy. Newton v. Employers Liability Assur. Corp., 107 F.2d 164 (4th Cir.), cert. denied, 309 U.S. 673, 60 S.Ct. 615, 84 L.Ed. 1018, rehearing denied, 309 U.S. 698, 60 S.Ct. 715, 84 L.Ed. 1037 (1939). The language of the **ACT** is meant to be read broadly to effectuate its goal, McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975); however,

> the changed social and economic conditions of the time as well as the problems those changes have produced or eliminated, logically factor into the consideration and should become influential factors in the interpretation of the Statute.

The goal of the **ACT** is to curb abuses incapable of existing in a

completed development. In a completed subdivision, the once promised amenities (golf course, roads, utilities, etc.) are in place subject to visual examination by the potential buyer.

Since 1968, there have been several court decisions that cite fact situations which make an entity not a "developer" within the scope of the ACT. Petitioner submits herewith one case that is directly applicable to the facts of this case. Notwithstanding these cases support Petitioner's position, both the District Court and the Fourth Circuit Court of Appeals elected to disregard them and relied solely on a very narrow interpretation of "developer" and the

applicable Exemption. An analysis of these cases, therefore, is in order.

In Adema v. Great Northern Development Co., 374 F. Supp. 318 (N.D. GA. 1973), the court held that Westinghouse Credit Corporation (WCC) was not a developer within the meaning of the ACT. WCC purchased the promissory notes which lot purchasers executed to the order of the developer seller when a lot was purchased. Notwithstanding Appellees' argument that all Appellants, including WCC, were engaged in a joint venture or common enterprise, namely the development and promotion of Treasure Lake in Georgia, the court ruled that WCC was neither a developer nor an agent. Plaintiff's claim that WCC taking title

by having a first lien on the lot made it a developer fell without merit.

The strict four corner definition of "developer" was abrogated in McCown v. Heidler 527 F.2d 204 (10th Cir. 1975). In this case, the purchasers sought recovery for alleged common-law fraud as well as for violations of the **ACT**. The lot buyers had purchased their lots in Timberlake, a large incomplete real estate subdivision promoted by Heidler Corporation and Timberlake, Inc. The developers promised a large lake, golf course, pools, a club house, and roads in the subdivision. The developer, instead of completing the subdivision and providing its promised amenities went bankrupt. Appellees not only sued the

bankrupt corporate developer but the principals thereof.

The lot buyers argued the two corporations and individual appellants knowingly misrepresented their corporate capacity to complete the development's amenities, thus operating a fraud and deceit on the buyers in violation of the **ACT**. The Court of Appeals held that while corporate officers, directors or any participating planners do not literally come within the provisions of the **ACT** defining a "developer" and an "agent," this limitation does not excuse them from liability under the **ACT**. In effect, the strict definition of "developer" was enlarged when the Court stated:

> We hold, therefore, that Appellees' alleged cause of action may properly be leveled against the individual Appellants in this case be they officers, directors, or participating planners. Such a construction of the **ACT**, although not specifically so stated, seems to have been taken for granted by other courts, for numerous courts have entertained action under the **ACT** leveled at 'controlling stockholders and directors'.

Id. at 207. In McCown, the court expanded the definition of "developer" by finding the appellants to be classic insiders to the corporate developer and thus aided and abetted in the developer's fraudulent scheme. (Id.).

The United States Court of Appeals for the Third Circuit in 1978 rendered an important decision pertaining to "developers" and their alleged aiders and

abettors. In Bartholomew v. Northampton Nat. Bank of Easton, 584 F.2d 1288 (3rd Cir. 1978), the court was faced with a development that Township officials allegedly opposed and thus refused to grant building permits, failed to approve plat maps, and did not allow installation of proposed sewer and drainage systems. OILSR halted sales at the Sherwood Forest Subdivision by suspending the developer's registration. The three appellant banks foreclosed on their respective liens taking title to the unsold portions of the project. They also confessed judgment on the installment agreements executed by the approximate 11 lot purchasers.

The court held that in absence of any allegation either that banks that were involved in financing an unsuccessful and incomplete subdivision or that the sole shareholder of the corporate limited partner of the land developer sold, offered to sell or advertised for sale any lots in the subdivision or that they performed any such activities through agents or other means, neither the financing banks nor the stockholder was a "developer" within the meaning and intent of the **ACT**. Id. at 1293. Consequently, neither the individual stockholder nor the banks were held liable for misstatements or omissions in the statutorily imposed Statement of Record and Property Report.

In a case directly on point Cumberland Capital Corp. v. Harris, 521 F.2d 246 (6th Cir. 1980), the United States Government, (i.e. HUD), contended Cumberland was a "developer" within the meaning and intent of the Land Sales Act. Cumberland argued otherwise.

Cumberland's involvement in land sales was an outgrowth of its activities as a lending institution. As security on loans, it took mortgages or deeds of trust on unimproved lots in a subdivision. On the default of a borrower, Cumberland would foreclose on the lot. At foreclosure, Cumberland would sometimes purchase the lot and thereafter offer it for resale.

It is in the **resale** of the lot by Cumberland that HUD took the position Cumberland was a developer and thus required to register with HUD, file a Statement of Record, and issue a Property Report.

Cumberland argued that to foreclose, purchase and resell does not characterize itself as a developer within the **ACT**. The Sixth Circuit Court of Appeals looked to the legislative history of the **ACT**, to whom it was aimed, and the abuses which it sought to cure. The Government contended that Cumberland was anything but a de minimus developer: For twenty months between August, 1970 and September 1973, 12% of Cumberland's total transactions were secured in whole or in

part by lots in subdivisions, representing 52% of its dollar amount of volume. Id. at 249.

The Court of Appeals noted that once Cumberland secured title from the lot owner who had defaulted on his or her loan, it held title to the lot until Cumberland again resold it. During this holding period, the lot was neither altered nor improved by Cumberland. It was also neither replatted nor subdivided.

The Court noted that Cumberland fell within the strict definition of the term "developer". Id. at 250. However, it found that for Cumberland to take title to a lot in a subdivision from a person who was a lot purchaser himself (and not

the original developer), hold such lot for a period of time and thereafter advertise and sell such lot was not a developer within the intents and purposes of the **ACT**. Thus, no registration with HUD was required and no requirement existed on Cumberland to issue to its purchasers a Property Report mandated by the **ACT**. In effect, the Court stated that to buy and resell a lot, and do no more, is insufficient to make it a developer.

The 1980 Cumberland case hinges on the concept of participation. The fact that Cumberland had taken title by deed in lieu of foreclosure or by foreclosure itself was immaterial; in effect acquisition of title is irrelevant. What

is important is what does not occur after acquisition of title. Cumberland states that if the lot owner participates in the development of the subdivision, it is a developer; if no such participation occurs, then the new lot owner would not be a developer.

Significant also was the lack of any concern as to the number of lots involved. It was virtually immaterial to the Sixth Circuit Court of Appeals whether Cumberland owned one or more lots or how it acquired title. The **ACT** will apply when a person sells "any lots" in a subdivision, be it one or more. Quantity, therefore, is not in issue in resolving who is and who is not a developer under the **ACT**.

LAKE COUNTRY, INC., did no more than what was illustrated in the Cumberland case. **LAKE COUNTRY, INC.** acquired lots in a subdivision and resold them. During the holding period, it undertook no participation in the 12 year old pre-existing and completed subdivision. No construction was necessary as Lake Land'Or had been fully constructed and completed a dozen years earlier. It did no replatting. It simply bought, marketed and resold a vacant lot (namely Lot B-427) without any involvement in the Subdivision whatsoever. As such it cannot logically and legally be considered a developer within the meaning of the Interstate Land Sales Full Disclosure Act.

In McKnight v. Board of Directors, 512 N.E.2d 316 (Ohio 1987), The Supreme Court of Ohio examined the definition of a developer under the Ohio Condominium Statute.[1] In this case, there were 574 condominiums offered for sale, with 212 in inventory and having been sold by Condo Marine Properties, Inc. before it defaulted under its loan with First Federal Savings and Loan Association of Toledo (First Federal). Condo Marine executed a deed in lieu of foreclosure. This gave First Federal ownership of 362

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[1] It should be noted that the definition of developer under the Ohio Condominium Statute parallels the definition of developer under the Interstate Land Sales Full Disclosure Act.

condominium units. First Federal then went about selling these units.

This case focused on the relationship First Federal possessed with the Condominium Association. In analyzing that relationship, the Court had to address the question of whether First Federal was a "developer" within the following definition:

> Any **person who**, directly or indirectly **sells** or **offers** for **sale** condominium ownership interests in a condominium development. 'Developer' includes the declarant of a condominium development and any successor to the declarant who stands in the same relation to the condominium development as the declarant.

Id. at 318. (Emphasis added).

The Supreme Court of Ohio ruled that mortgagee First Federal by "acquiring

title to property either through foreclosure or by accepting a deed in lieu of foreclosure, does not necessarily assume the role of the 'developer'. Id. at 319. However, when the mortgagee performs acts as to become intertwined with the promotion and development of the property that it, in essence, engages in the business of the developer, it takes on a whole new character and thus it could not insulate itself from the duties, constraints and obligations of a developer. In this case the record clearly supported the trial court's finding that First Federal attempted to develop the complex and participate in and profit from the condominium business.

It was this participation that made First Federal a developer.

In a dissenting opinion, Justice Douglas made the following astute observation:

> Even more disturbing is the fact that these uncontemplated consequences of our decision are not limited to the imposition of these duties on financial institutions accepting a deed in lieu of foreclosure. Under the analysis advanced therein, any person who sells or offers for sale ownership interest in a condominium development is a developer, and thereby incurs all the responsibilities of a developer as outlined in R.C. 5311.25 and 5311.26. Surely the legislature did not intend to inflict this burden on private individuals who buy several units and then offer them for sale in the hope of enjoying a modest profit. Yet today's opinion, whether we realize it or not, brings about this result.

Id. at 328. (Emphasis added).

In Chotka v. Fidelco Growth Investors, 383 So.2 1169 (Fla. App. 1980), a lending institution foreclosed on its mortgage after the condominium project had been completed except for the swimming pool, tennis court, lobby, game room, elevator lobbies, and two sauna baths which the lending institution completed. The court held the foreclosure by Fidelco in and of itself did not constitute Fidelco as a developer; however, Fidelco became more than just a lender and thus a developer when it took title to the project, completed construction, and held itself out to be the developer and owner of the project, advertising and selling units to

purchasers; hence, a participant in the condominium's profit making scheme.

Again, to become a "second developer" does not per se capture one in the web of being a developer. An active involvement in completing the project changes the new lot owner from simply being a "second developer" to a "developer".

In First Federal Savings and Loan v. Department of Business Regulations, 472 So.2d 494 (Fla. App. 5 Dist. 1985), First Federal made convertible construction/permanent type loans on individual condominium units to an original condominium developer. In lieu of foreclosure, First Federal took deeds from the developer on 11 units and sold

one to one buyer and ten to another buyer. The Florida Department of Business Regulation took the position that by virtue of entering into contracts for sale and purchase and executing deeds to two purchasers, First Federal became a "developer" and therefore required to file as a developer under the Florida Condominium statute.[2] First Federal took the position that to become a second developer was not a position envisioned by the Florida Condominium statute so as to require it to register.

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[2] The Act allows states requiring substantially similar standards for land sales and developments to implement state registration requirements that can serve as the federal registration. 15 U.S.C. Section 1708. The State of Florida was certified under the Act on January 18, 1982. Department of Housing and Urban Development, OILSR Biennial Report To Congress, at p. 21 (March 1981).

The Fifth District Court of Appeal of Florida agreed with First Federal:

> The position of the Division that all persons who fit the definition of "developer" contained in 718.-103(13), Florida Statutes, must in every case file under 718.502, Florida Statutes, cannot be sustained. It would mean that every person, other than a person acquiring a unit for his own occupancy, who ever bought a condominium unit for lease or resale and later offered it for sale in the ordinary course of their usual business would be required to file and meet the requirements of the Division to do business as a developer before the individual condominium unit could be offered for resale. The purpose of Chapter 718 is to regulate the creation, sale and operation of condominiums, not to forever regulate the sale of each and every condominium unit. Most of the references to developer in chapter 718 make sense only if construed to refer to the original (creator) developer and subsequent or

> succeeding developers of the condominium project and those corporately, contractually or otherwise involved with the creator and the original promotion of the condominium project and the sale of units in it. Contrary to the assumption of the Division, there is no evidence in this case that the loan association took over and continued the business of the original person who developed this condominium project nor that the association in this case offered units for sale in the ordinary course of the business of creating and selling condominium units. Therefore we hold the loan association was not required to file under section 718.502(1), Florida Statutes.

Id. at 497. (Emphasis Added).

In Council of Co-Owners v. Whiting-Turner, 517 A.2d 336 (Md. 1986), the Atlantis Condominium Owners Association sued the general contractor, developer,

and architects of the condominium building, alleging that their negligence had resulted in deficient construction of the 21 story condominium building containing 198 separate condominiums. The appellees specifically contended the utility shafts and related electrical work were not constructed and installed in accordance with the plans and specifications and did not comply with the requirements of the applicable building code.

While the case involved liability to purchasers who are not in privity of contract with those to whom liability is ascribed, the Maryland Court of Appeals was faced with the necessity of defining the term "developer":

> A developer generally is thought of as one who improves and subdivides land, and builds and sells residential structures. Development and sale of land may be the sole business of the developer or it may be undertaken as a sideline by persons principally engaged in other businesses. The developer is the entrepreneur; he owns the land, determines how it is to be developed, and often selects others to perform some or all of the functions of testing, design, construction, supervision, financing, and marketing. Exclusive authority to control every phase of the project rests initially with the developer. In the case of major developers, that control may be retained in its entirety. See e.g., Shipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965). In other cases, the developer may employ independent contractors, and may by contract determine the extent of actual control or supervision that he will retain.

Id. at 345-346. (Emphasis Added).

LAKE COUNTRY, INC. submits that it is not a "developer" within the intents and meaning of the Interstate Land Sales Full Disclosure Act. It is no more than a used lot salesman in a subdivision that was formerly registered with HUD by its sole and only developer (Lake Land'Or, Inc.) and which had been totally completed and sold out some 12 years earlier.

Clearly the cases support the conclusion that for a lending institution to acquire lots in a subdivision through a deed in lieu or actual foreclosure and thereafter resell them is not a developer within the **ACT**. The key factor is not how the lot was acquired and resold but whether during the holding period,

participation in the construction of the incomplete subdivision occurred. If the answer to this inquiry is in the affirmative, the second purchaser becomes a developer within the **ACT**. Not to participate makes one a "second developer" and not within the **ACT**; thus, no registration is required and no Property Report need be issued.

In effect, the cases reflect that where participation in the scheme of development does not exist, the definition of "developer" is constricted to militate against its inclusion in the regulatory scheme. However, where participation is found to exist, the definition is expanded to capture all

participants involved. Cumberland, supra, at 250.

Congress intended to capture the initial planner and profit maker and make it the developer. McCown, supra, p. 207. Congress did not intend to take every successor in title and treat him the same. To so hold would make every lot owner in every subdivision in the United States consisting of more than twenty-five lots, (or otherwise not exempt) register with HUD, file an extensive Statement of Record (approximately 300 pages in length), submit an $800.00 filing fee (24 C.F.R. 1710.35), and include certain mandatory language in the contract of sale before the lot could be advertised for sale. A statutorily

imposed right of rescission would also exist. In its 1981 Biennial Report To Congress the Office of Interstate Land Sales Registration (OILSR) reported that survey evidence showed that the cost of filing prior to the 1979 amendments to the **ACT** was between $7,500.00 and $25,000.00. The simplifications introduced by the 1979 amendments were expected to produce a 34% cost reduction. Department of Housing and Urban Development, OILSR Biennial Report To Congress, at p. 25 (March 1981). Given that these figures are thirteen years old, the economic impact upon the real estate industry would be staggering if the **ACT** is interpreted to include the

second generation of sales within a completed subdivision.

Statistics maintained by OILSR indicate that as of January 2, 1992, there had been 12,705 filings with HUD covering 6,579 subdivisions since the ACT'S inception in April, 1969. There are currently 3,252 active registrations covering 2,056 subdivisions. 262 applications are in process; 9,453 filings have been suspended, one being at Lake Land'Or Subdivision.

The 6,579 subdivisions cover 6,121,410 lots with a total acreage of 5,490,012.

In affirming the District Court, the Fourth Circuit has stated that if any one person sells or leases or offers to sell

or lease or advertises for sale or lease any one of these 6,121,410 lots within the 6,579 subdivisions, registration with HUD is mandatory notwithstanding that:

- the seller is anyone other than the original developer;
- the seller did no more than purchase a lot and attempted to re-sell it;
- the seller did not participate in any aspect of the subdivision's creation, construction, or sell-out;
- the seller acquired one lot or multiple lots; or
- the seller acquired the lot by gift, devise, arms-length purchase, or otherwise.

This conclusion thwarts economic growth, frustrates the economy, and directly involves government in the affairs of buyer and seller of a lot in an otherwise completed subdivision. The District Court's ruling and the Fourth Circuit's affirmation disregard the essential grasp of the **ACT** and has created a situation that prevents banks from lending on lots in a subdivision, enables current buyers to avoid a lot purchase where the predecessor in title failed to register with OILSR and has effectively placed the industry in a state of total paralysis.

In this case **LAKE** purchased Lot B-427 in Lake Land'Or Subdivision 12 years after the Subdivision was fully completed

and sold out. LAKE did no more than to acquire title. Petitioner performed absolutely no construction to the Subdivision itself or to Lot B-427. It performed no grading, site clearing or staking. It recorded no subdivision plats. It engaged no contractor, engineer or surveyor to perform any function whatsoever. It took no participation in any development stage of an otherwise totally completed Subdivision. It merely acquired Lot B-427, held it in inventory, and resold it to the Olsens.

Congress did not intend to include second generation sales of this nature within the ACT. To so hold would cast the net of this federal regulatory agency

over many similarly situated sellers in defiance of the purpose of the **ACT**.

B. A Television Advertisement Which Contains An Inducement To Visit The Subdivision Does Not Disqualify A Developer From The Single-Family Residence Exemption Afforded By 15 U.S.C. Section 1702(b)(5).

The Single-Family Residence Exemption, ("Exemption") afforded by 15 U.S.C. 1702(b)(5), allowed the sale of Lot B-427 to the Olsens without filing the Statement of Record with HUD or issuing to the Olsens a Property Report. The exemption, however, does not excuse

the seller from the fraud provisions of the ACT.

The District Court found that Petitioner did not qualify for this exemption and the Court of Appeals affirmed this ruling.

For the exemption to apply, two threshold Subdivision Requirements and eight Lot Requirements must be met. For purposes of this Petition, only one of the two threshold Subdivision Requirements is in dispute.[3]

15 U.S.C. Section 1702(b)(5)(G) provides that the Exemption only applies where:

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[3] In essence, the District Court found that the other requirements had been satisfied. The issue was therefore not addressed by the Court of Appeals.

> there are no offers, by direct mail or telephone solicitation, of gifts, trips, dinners, or other such promotional techniques to induce prospective purchasers or lessees to visit the subdivision or to purchase or lease a lot.

(Emphasis Added).

The regulation promulgated by the Office of Interstate Land Sales Registration (OILSR) under Section 1702(b)(5)(G) states:

> In the promotion of the subdivision there must be no offers, by direct mail or telephone solicitation, of gifts, trips, dinners or use of similar promotional techniques to induce prospective purchasers to visit the subdivision or to purchase a lot.

24 C.F.R. Section 1710(b)(2). (Emphasis Added).

The Guideline for the Single-Family Residence Exemption available under the ACT as issued by OILSR states:

> [ii] In the promotion of the subdivision, there cannot be offers, by direct mail or telephone solicitation, of gifts, trips, or dinners or the use of similar promotional techniques to induce prospective purchasers to visit the subdivision or to purchase a lot. There is no prohibition against using the mails, telephone, or other advertising media to promote or advertise the offering or to respond to inquiries from potential purchasers. The only prohibition is that these media cannot contain offers of gifts, trips, dinners, or other inducements.

24 C.F.R. Section 1710, Appendix A, Part V(c)(e)(ii). [Emphasis Added].

The OILSR Guideline impermissibly expands the plain language of the statute and regulation promulgated thereunder.

"The starting point in every case involving construction of a statute is the language itself". Ernst & Ernst v. Hochfelder, 425 U.S. 125, 197, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976); Blue Chip Stamps v. Manor Drug Stores, 321 U.S. 723, 756, 95 S.Ct. 1917, 44 L.Ed.2d 539 (Powell, J., concurring). "Neither the administrative officers nor the courts may supply omission or enlarge the scope of the statute." Busey v. Deshler Hotel Co., 130 F.2d 187, 190 (6th Cir. 1942). (Emphasis Added).

> [T]he role of agencies remains basically to execute legislative policy; they are no more authorized than the courts to rewrite acts of Congress . . . in the absence of some contrary indication, we must assume that the framers of these statutory provisions intended to

> convey the ordinary meaning which is attached to the language they used.

Talley v. Mathews, 550 F.2d 911, 919 (4th Cir. 1977); U.S. v. Stokley, 881 F.2d 114, 116 (4th Cir. 1989); Louisiana Chemical Ass'n v. Bingham, 657 F.2d 777, 779 (5th Cir. 1981).

Both the District Court and the Fourth Circuit Court of Appeals erred when neither scrutinized the unauthorized expansion of the statute and regulation by the OILSR Guidelines.

> Courts have routinely subjected administrative regulations to close scrutiny or review, annulling those that are incompatible with the underlying statute, including those that attempt to 'enlarge the scope of the statute'.

City of Tuscon, Ariz. v. C.I.R., 820 F.2d 1283 (D.C. Cir. 1987).

The Guidelines themselves are not substantive regulations, only interpretive rules. It is an ancient maxim of statutory construction that the express mention of one thing implies the exclusion of another, expressio unius est exclusio alterius.

The OILSR Guidelines improperly enlarge the clear and unambiguous language of the statute and regulation. The statute permits promotional techniques; they are disqualified from the exemption, however, if they are offered by either direct mail or telephone solicitation. "Direct" means "cold calling", a term used when the

customer receives the initial call and not where the initial call is made by the customer. **LAKE COUNTRY, INC.** contends that it did not offer promotional techniques within the meaning of subpart (G) of 15 U.S.C. 1702(b)(5). **LAKE COUNTRY, INC.** admits that an offer was contained in a television advertisement as alleged, i.e. the $35.00 voucher. The media employed is the television and the concept is advertisement and not solicitation. People v. Beaulieu Relations, Inc., 494 N.E.2d 504, 508 (Ill. App. 1 Dist. 1986). See also, 1968 U.S. Code Congressional and Administrative News, 2873, Vol.2, page 3066.

For HUD to impose an interpretation of its regulations which expands "direct mail and telephone solicitation" to include "other advertising media" is to enlarge the scope of the statute. While remedial statutes should be construed broadly to effect the purpose of the legislature this canon of statutory construction does not authorize a court to ignore the plain wording of the statute. Hines v. United Parcel Service, 736 F.Supp 675 (D.S.C. 1990). The Fourth Circuit Court of Appeals erred when, relying upon the OILSR Guidelines and not the ACT or the applicable Regulation, it concluded that HUD's interpretation of the ACT was reasonable:

> We are unpersuaded that the omission of television from the subsection by Congress was meant to indicate its approval of its use by developers to induce potential buyers to visit.

App. p. A46. Television was a popular form of media when the **ACT** was passed in 1968. It is safe to assume that Congress was aware of the use of television as a means of advertisement in 1968, unlike, for example, the appearance in recent years of unsolicited "fax junk mail" which could not have been contemplated in 1968. Unlike direct mail and telephone solicitation which may impose a promotion upon an unwilling recipient, television is a voluntary media, which the viewer may watch at option. If Congress had intended to preclude the use of

television it could have and would have done so.

This error was the sole reason that the Court below ruled that the Exemption did not apply. **LAKE COUNTRY, INC.** calls upon this Court to reverse this error and rule that a gift, trip, dinner, or other such promotional technique offered in a television advertisement or a newspaper is permitted under 15 U.S.C. Section 1702(b)(5) of the **ACT** without disqualifying it from the Exemption afforded thereby.

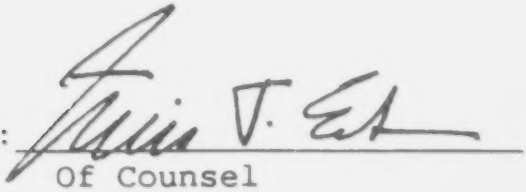
X. CONCLUSION

For each and every, or any, of the foregoing reasons, Petitioner respectfully requests that a Writ Of

Certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the decision of that Court.

Respectfully submitted,

LAKE COUNTRY, INC., a Virginia corporation

By: 
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"APPENDIX"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

LEROY OLSEN, et al, Plaintiffs,	)	
v.	)	Civil Action No. 90-00071-R
LAKE COUNTRY, INC., et al, Defendants.	)	

ORDER

For the reasons stated from the bench and deeming it just and proper so to do, defendant Lake Country Inc.'s motion for summary judgment be, and the same is hereby DENIED.

Defendant Northeastern Bank of Pennsylvania's motion to dismiss is CONTINUED. Defendant Northeastern is ORDERED to maintain a record of funds expended in further discovery from this day forward.

Let the Clerk send a copy of this Order to all counsel of record.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date 2 - MAY 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

LEROY AND CHERYL OLSEN, Plaintiffs,	)	
v.	)	
LAKE COUNTRY, INC., ET AL., Defendants.	)	90-00071-R

MEMORANDUM

This matter is before the Court on Defendant Northeastern Bank's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiffs' and Defendant Northeastern Bank's motions for summary judgment pursuant to Fed. R. Civ. P. 56, and on Plaintiffs' motion for class certification pursuant to Fed. R. Civ. P. 23. The matters have been fully briefed and argued and are ripe for disposition.

Jurisdiction is based on 28 U.S.C. §1331 and 15 U.S.C. §1701-1720.

Plaintiffs bring this action on behalf of themselves and all other persons who have purchased unimproved lots at the Lake Land'Or development in Caroline County, Virginia ("the Development"), from or through the Defendants, particularly Lake Country, Inc. ("Lake"). Plaintiffs allege in Count One of their complaint that in selling such lots, the defendants violated the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1710-1720, ("the Act"), by not registering the lots with the United States Department of Housing and Urban Development ("HUD") and by not providing lot purchasers with property reports. Plaintiffs claim that under the Act, they are entitled to

rescission of the lot transactions or to damages, and to attorneys' fees and other expenses.

Plaintiffs assert fraud claims under the Act and under Virginia law in Counts Two and Three, respectively, and seek compensatory and punitive damages as well as attorneys' fees and costs in relation to those counts.

Background

In 1971, Lake Land'Or, Inc. began to develop a subdivision consisting of 2100 lots divided into two parts: Land'Or, consisting of 1200 lots, and Heritage, consisting of approximately 900 lots. All of the lots were to be provided with water by the Land'Or Utility Company ("Utility"), a private utility company owned by Lake Land'Or. The Utility was also to provide sewer

facilities to the Heritage lots. In May 1988, Lake Land'Or sold its existing inventory of lots to Defendant Cost Control Marketing and Sales Management of Virginia, Inc. (CCM&SM), and all of the stock of the Utility to the three individuals who own Defendants Lake and CCM&SM.

In August 1988, using funds borrowed from Defendant Northeastern Bank, Lake purchased a block of lots at the Development from CCM&SM. Lake then purchased additional lots at the Development from individual sellers until it held approximately 350 unimproved lots.

Lake subsequently marketed the lots to the general public in Washington, D.C., Maryland, Pennsylvania, New Jersey, New York and Virginia by means of

television ads which promoted homes and invited viewers to call a toll-free number to arrange a visit to the Development. The television ads further promised that visitors to the Development would be paid an undisclosed sum of money. Plaintiffs called the toll-free number and were asked to leave their address and telephone numbers. Plaintiffs subsequently received a telephone call offering them $35 to visit the Development. The $35 was to be paid in the form of a voucher that would be mailed to Plaintiffs as confirmation of their appointment to visit the Development and that would be redeemable upon their arrival for their appointment. Plaintiffs subsequently visited the Development and claim that they were subjected to misrepresentations and other

fraudulent sales tactics by Lake. In addition, Plaintiffs claim that Lake violated the Act by not registering its lots with HUD and by not providing lot purchasers with property reports. Lake admits that it did not register the lots or provide the reports, but contends that it is not subject to the Act's provisions because it is not a developer, and because it is exempt under the Act's single family residence exemption.

On April 30, 1990, this Court denied Lake's then pending motion for summary judgment and continued Northeastern Bank's motion to dismiss.

Plaintiffs' Motion for Summary Judgment

1. As to Defendant Lake

Plaintiffs move for summary judgment as to Count One of their complaint, seeking rescission or damages

for alleged violations of the Act. In support of their motion, Plaintiffs argue that Lake is a developer under the Act and that Lake is not entitled to the single family residence exemption because Lake gave cash gifts to induce prospective purchasers to visit the lots, because potable water was not extended to all lots, and because the lot bought by Plaintiffs is not on a paved road.

This Court rejected Lake's contention that it is not a developer under the Act when the Court, as noted infra, denied Lake's summary judgment motion on April 30. Accordingly, there is no need to restate the arguments made by the parties in reference to that issue. It is sufficient to note that the Act defines a developer as "any person who, directly or indirectly, sells or

leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision." 15 U.S.C. §1701(5). As an entity that sold lots in a subdivision, Lake is a developer under the Act.

Having determined that Lake is a developer and therefore subject to the Act's provisions, the Court must decide whether Lake is exempt under the Act's single family residence exemption, contained in 15 U.S.C. §1702(b)(5). Subsection (G) to the exemption provides that the exemption applies only where "there are no offers, by direct mail or telephone solicitation, of gifts, trips, dinners, or other such promotional techniques to induce prospective purchasers or lessees to visit the subdivision or to purchase or lease a

lot." Lake argues that the vouchers given to prospective purchasers were initially offered as part of its television advertisements and thus did not constitute offers by mail or telephone solicitation as prohibited by the exemption. Lake's narrow interpretation of the exemption's strictures is belied by the HUD guidelines for exemptions available under the Act, however. These guidelines state that "[t]here is no prohibition against using the mails, telephone, or other advertising media to promote or advertise the offering or to respond to inquiries from potential purchasers. The only prohibition is that these media cannot contain offers of gifts, trips, dinners or other inducement." 24 C.F.R. 1710, App. A. (4/1/89 ed.) (emphasis added).

Since Lake's television advertisements contained the inducement of a cash gift, Lake is not exempt under the Act's single family residence exemption. This is enough to grant summary judgment to Plaintiffs as to Defendant Lake on Count One, but in the interest of thoroughness, the Court will address Plaintiffs' remaining two arguments as to why, in its opinion, Lake is not entitled to the single family residence exemption.

Plaintiffs next argue that Lake is not entitled to the exemption because potable water was not extended to all lots. Plaintiffs base their argument on the fact that the Utility has the capacity to provide water to only 250-300 homes, while there are 2100 lots. However, the exemption requires only that potable water be available to the lot

sold, not to all existing lots. See 15 U.S.C. §1702(b)(5)(C). There are currently 255 homes built in the Development, with 8 to 12 more under construction. The number of homes in the Development therefore does not currently exceed the Utility's capacity, and there are no allegations that any homes are presently without water. Plaintiffs' argument in this respect must thus fail.

Plaintiffs' final argument regarding the exemption is that Lake does not qualify for the exemption because the lot which Plaintiffs' bought is on a gravel-covered road. The exemption requires that the lot be situated on a "paved street or highway." 15 U.S.C. §1702(b)(5)(B)(i). The relevant HUD regulations define "paved" as "concrete or pavement with a bituminous wearing

surface that is impervious to water, protects the base, and is durable under the traffic load and maintenance contemplated." 24 C.F.R. §1710.10(c)(3) (4/1/90 ed.) Under this definition, a gravel-covered road would not be "paved." However, Lake denies that the road on which Plaintiffs' lot is situated is gravel-covered, and attached a letter from the Caroline County Board of Supervisors, dated Aug. 26, 1988, which says that all lots within the Development are situated on paved streets. Defendants' Objection to Plaintiffs' Motion for Partial Summary Judgment, Ex. C(2). Whether or not the road is paved is irrelevant, however, since Lake's offer of a cash voucher to prospective purchasers was enough to disqualify Lake from the exemption.

2. As to the Other Defendants

a) Defendant Hugh Boyle

§1709 provides for a right of action against a developer or agent. §1701(6) defines "agent" as "any person who represents, or acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lot or lots in a subdivision." Although Plaintiffs motion is not clear on this point, it would seem that they are suing Boyle as the agent for Lake. Plaintiffs allege that they were directed to make their checks payable to Boyle and that he was held out to them as the broker who was in charge of selling lots at the Development for Lake. The Defendants do not dispute these allegations in their response to Plaintiffs' motion, so the Court may consider them conceded. Thus,

because Lake's liability has been established, Boyle is likewise liable as Lake's agent.

b) Defendants CCM&SM, Cost Control Marketing and Management and Northeastern Bank

Plaintiffs claim that CCM&SM, Cost Control Marketing and Management, and Northeastern Bank are liable as aiders and abettors of Lake. In order to establish these Defendants' liability as aiders and abettors, Plaintiffs must show that the defendants knowingly assisted or participated in the fraud in violation of the Act. Fuls v. Shastina Properties, Inc., 448 F. Supp. 983, 980 (N.D. Cal. 1978).

Plaintiffs contend that Defendants CCM&SM and Cost Control Marketing and Management are liable as aiders and

abettors because they were co-makers of the notes by which Lake borrowed to purchase the lots, and they delivered joint financial statements with Lake to Northeastern. Plaintiffs have not supported these allegations with any evidence or sworn statements. The defendants do not respond to these allegations in their Objection to Plaintiffs' Motion for Partial Summary Judgment, however, in their answer to the complaint they contend that Lake was the sole owner of the lots. The Court concludes that whether the defendants' actions rose to the level of knowing assistance or participation in the fraud requires further development of the facts, and that Plaintiffs' motion for summary judgment as to these defendants will be denied accordingly.

As for Northeastern Bank, the Court notes that the Act exempts banks acting in the normal course of their business. Timmreck v. Munn, 433 F. Supp. 396, 406 (N.D. Ill. 1977). Factors to consider are the bank's participation in the planning of the project, the preparation of the statement of record, the sales efforts of the other defendants, and the extent to which the bank held itself out as the financial backer of the project. Id.

Plaintiffs allege merely that Northeastern lent Lake the money that allowed it to purchase the lots and that Northeastern did so knowing that Lake had been accused of violating the Act. While Northeastern's actions may not have been prudent, and indeed may have been reprehensible, in the Court's view they

did not rise to the level of active participation in the fraud necessary for aider and abettor liability. The Court therefore will deny Plaintiffs' motion for summary judgment as to Northeastern.

Northeastern Bank's Motions to Dismiss and for Summary Judgment

For the reasons discussed above with regard to Plaintiffs' motion for summary judgment, the Court will grant Northeastern's motion to dismiss. Northeastern's summary judgment motion will accordingly be dismissed as moot.

Plaintiffs' Motion for Class Certification

Plaintiffs seek class certification with regard to Count One of their complaint. Class certification is a two-step process. First, Plaintiffs must show that the action meets the four Fed. R. Civ. P. 23 (a) requirements of

numerosity, commonality, typicality and capability. Next, Plaintiffs' must show that the action fits within one of the Rule 23(b) categories. Those categories are: (1) actions wherein individual adjudication would prejudice either the party opposing the class or the class members themselves; (2) actions wherein injunctive or declaratory relief appropriate to the entire class is sought; and (3) actions wherein common questions of law or fact predominate and the class action device is the superior means of adjudication. In re A.H. Robins, 880 F.2d 709, 727-728 (4th Cir. 1989).

The Court is satisfied that the action meets the four requirements of Rule 23(a). The Court does not find certification appropriate under any of

the three Rule 23(b) categories, however. Rule 23(b)(1) certification is inappropriate because no showing has been made that either party would be prejudiced by individual adjudication. Rule 23(b)(2) certification is inappropriate because neither injunctive nor declaratory relief is sought. Finally, the Court finds that Rule 23(b)(3) certification is inappropriate because a class action is not the superior means of adjudication of Count One. The relief sought in that count is either rescission or damages, and if damages are awarded, a determination of the amount due each plaintiff would need to be made individually. Furthermore, Plaintiffs acknowledge that the claims of fraud and damages alleged in Counts Two and Three will have to be tried

individually. Finally, as shown by the Court's ruling on Plaintiffs' motion for summary judgment, the issue of Lake's liability under the Act can be resolved on summary judgment, so individual adjudication of the issue would not involve repetitive evidentiary hearings. For these reasons, the Court finds that certification of the proposed class is not the superior means of adjudicating Count One. Plaintiffs' motion for certification will be accordingly denied.

Conclusion

For the reasons discussed above, Plaintiffs' motion for summary judgment will be granted with respect to Defendants Lake and Boyle and denied with respect to Defendants CCM&SM, Cost Control Marketing and Management, and

Northeastern Bank. Plaintiffs motion for class certification will also be denied. Defendant Northeastern Bank's motion to dismiss will be granted, and their motion for summary judgment will be dismissed as moot.

An appropriate Order will issue.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date 6-20-90

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

LEROY AND CHERYL OLSEN, Plaintiffs,	)	
v.	)	
LAKE COUNTRY, INC., ET AL., Defendants.	)	90-00071-R

ORDER

This matter is before the Court on Defendant Northeastern Bank's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiffs' and Defendant Northeastern Bank's motions for summary judgment pursuant to Fed. R. Civ. P. 56, and on Plaintiffs' motion for class certification pursuant to Fed. R. Civ. P. 23. The matters have been fully briefed and argued and are ripe for disposition. Jurisdiction is based on 28 U.S.C.

§1331 and 15 U.S.C. §1701-1720.

For the reasons stated in the accompanying Memorandum, and deeming it just and proper so to do, the Court issues the following rulings on the motions before it:

(1) The Court GRANTS Defendant Northeastern Bank of Pennsylvania N.A.'s motion to dismiss for failure to state a claim; Defendant Northeastern stands dismissed with its costs.

(2) The Court hereby GRANTS Plaintiffs' motion for summary judgment as to Count 1 against Defendants Lake Country, Inc. and Hugh Boyle. Plaintiffs' motion for summary judgment as to Defendants Cost Control Marketing and Sales Management, Cost Control Marketing and Management, Inc., and Northeastern Bank of Pennsylvania, N.A. is hereby DENIED.

(3) Defendant Northeastern Bank of Pennsylvania N.A.'s motion for summary judgment is DISMISSED as MOOT.

(4) Plaintiffs' motion for certification of a class is DENIED.

Let the Clerk send a copy of this Order and the accompanying Memorandum to all counsel of record.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date 6-20-90

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

LEROY OLSEN, et al., Plaintiffs,	)	
v.	)	Civil Action No. 90-00071-R
LAKE COUNTRY, INC., et al., Defendants.	)	

ORDER

This day came the parties and represented to the Court that although the defendants continue to maintain that there is no liability on their respective parts concerning the issues in this cause, and that in the interest of avoiding further litigation in this Court as well as to save costs, they have entered into a stipulation in reference to the sole remaining issue of damages.

The Court having previously found liability against the defendants, plaintiffs Leroy Olsen and Cheryl Olsen are, on the basis of the Court's finding and the aforementioned stipulation, entitled to nominal damages in the amount of $1,500.00 and costs including counsel fees, taxable and all other costs in the amount of $10,500.00. Deeming it proper so to do, it is therefore ADJUDGED, ORDERED AND DECREED that plaintiffs recover of the defendants the sum of $12,000.00. Judgment in that amount is accordingly entered with interest from this date at the rate of 7.88% per annum.

Defendants having advised the Court of their intention to appeal the Court's finding of liability, the Court will stay execution of the aforesaid judgment during the pendency of any such appeal

provided defendants place with the Court a bond satisfactory to the Clerk thereof in the sum of $15,000.

Defendants' exception to the Court's finding of liability is hereby noted.

Further concluding it proper so to do, it is ADJUDGED AND ORDERED that plaintiffs' motion to amend the complaint, which has been held under advisement, be and the same is hereby DENIED.

Let the Clerk send a copy of this Order to all counsel of record.

/S/ Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

Date 02 AUG 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

LEROY OLSEN, et al, Plaintiffs,	)	
v.	)	Civil Action No. 90-00071-R
LAKE COUNTRY, INC., et als, Defendants.	)	

NOTICE OF APPEAL

Notice is hereby given that Lake Country, Inc., defendant above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment entered in this action on the 2nd day of August, 1990.

/S/ FRANCIS T. ECK
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Attorney for Lake Country, Inc.

CERTIFICATE

I hereby certify that I mailed a true and exact copy hereof to F. Bosley Crowther, III, Esquire, P.O. Box 308, Palmyra, Virginia, 22963, Counsel for Plaintiffs, on Monday, August 20, 1990.

/S/ FRANCIS T. ECK
Francis T. Eck

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LEROY OLSEN; CHERYL OLSEN,	)	
PLAINTIFFS-APPELLES,	)	
v.	)	No. 90-2163
LAKE COUNTRY, INCORPORATED,	)	
DEFENDANT-APPELLANT,	)	
and	)	
COST CONTROL MARKETING AND SALES MANAGEMENT; NORTHEASTERN BANK OF PENNSYLVANIA, N.A.; COST CONTROL MARKETING AND MANAGEMENT, INCORPORATED; HUGH BOYLE,	)	
DEFENDANTS.	)	
LEROY OLSEN; CHERYL OLSEN,	)	
PLAINTIFFS-APPELLES,	)	
v.	)	No. 90-2174
LAKE COUNTRY, INCORPORATED,	)	

DEFENDANT-APPELLANT,

and

COST CONTROL MARKETING AND SALES MANAGEMENT; NORTHEASTERN BANK OF PENNSYLVANIA, N.A.; COST CONTROL MARKETING AND MANAGEMENT, INCORPORATED; HUGH BOYLE,

DEFENDANTS.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond.
Robert R. Mehrige, Jr.,
Senior District Judge.
(CA-90-71-R)

Argued: March 5, 1991

Decided: November 18, 1991

Before RUSSELL, Circuit Judge, BUTZNER, Senior Circuit Judge, and DUPREE, Senior United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Francis Townley Eck, ECK, COLLINS & ANDERSON, Richmond, Virginia, for Appellant. Francis B. Crowther, III, CROWTHER & BRESEE, P.C., Palmyra, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Lake Country, Inc. (Lake") appeals from the district court's judgment in favor of Leroy and Cheryl Olsen for damages and costs arising from the sale of real property and violations of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1701-1720 (1988). We affirm.

I.

Lake is a Virginia corporation established for the purposes of acquiring lots from members of the public and then placing them on the market for resale to new buyers. Lake Land'Or is a property development in Caroline County, Virginia, original developed by Lake Land'Or, Inc., ("Land'Or, Inc.") in 1971. The development originally consisted of 2100 lots divided into two parts: Land'Or, which was comprised of approximately 1200 lots, and Heritage, which contained approximately 900 lots.

In May 1988, Land'Or, Inc. sold its inventory of lots to Cost Control Marketing and Sales Management of

Virginia, Inc. ("CCMV").[1] Land'Or, Inc., and CCMV. In August 1988, Lake purchased several lots from CCMV. Additional lots were purchased from individual sellers, resulting in a total of 350 unimproved lots owned by Lake.

Lake actively marketed the lots to the general public in Washington, D.C., Maryland, Pennsylvania, New Jersey, New York, and Virginia, utilizing television commercials to promote the lots and inviting viewers to call a toll-free number to arrange a visit to the development. The Olsens responded to one such advertisement and were asked to leave their name and address. Later,

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[1]It also sold all of the stock of a utility company to three private individuals who owned CCMV was a defendant in this suit but is not a party to this appeal.

they received a telephone call in which they were offered $35 to visit the development, which they accepted. When they visited the property, they were subjected to a sales campaign by Lake employees which included announcements of sales over a radio in the office and the car in which they were escorted around the property, a statement made to them by an "appraiser" that the property would increase in price the very next day, and assurances that they had been pre-approved for credit. They were also subjected to misrepresentations by Lake regarding the availability and cost of utilities for the property and other factors associated with building a home on their lot.

By the end of a seven-hour day, the Olsens had agreed to purchase a plot in

the Heritage section, for substantially more than the lot was worth. Never did they receive a property report as required by the Act nor was the lot registered with the Department of Housing and Urban Development ("HUD"), all in violation of 15 U.S.C. §1703. In addition, they later discovered that they had been rejected for credit by the bank to which they had been sent and ended up paying for the property with cash obtained from IRA accounts they closed. In addition, although they had been told that water and sewer service were available to lot owners, such service as found to be grossly inadequate to meet the needs of all lots in the development. Consequently, they brought this civil action under 15 U.S.C. §1709 seeking

damages.[2] The district court granted summary judgment to the Olsens on the issue of liability and subsequently awarded nominal damages and "other costs." Lake raises two issues on appeal. First, Lake contends that it is not a "developer" within the meaning of the Act and is therefore not subject to its registration and disclosure provisions. Second, it contends that it is entitled to the single family residence exemption under 15 U.S.C. §1702(b)(5).

II.

According to the Act's plain language, we are of the view that Lake is a "developer" within the meaning of the Act. "Developer" is defined under the

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[2]The Olsens sought damages rather than rescission of the contract because they eventually built a home on the property.

Act

> as any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision.

15 U.S.C. §1701(5). Clearly, Lake directly advertised and sold property located in Lake Land'Or.

"Subdivision" is defined as

> any land which is located in any State or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan.

15 U.S.C. §1701(3). "Common promotion plan" is defined as

> a plan, undertaken by a single developer or a group of developers acting in concert, to offer lots for sale or lease; where such land is offered for sale by such a developer or group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit

> or by a common name, such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of common promotional plan.

15 U.S.C. §1701(4). Lake sold land in the common unit known as Lake Land'Or as part of its general promotional campaign. ,

Appellant's principle argument is that, by applying a broad reading of this definition, any seller of property in Lake Land'Or would be a "developer" within the meaning of the Act, including private persons selling their property. That question, however, is not at issue in this case. More important is the undisputed purpose of the Act to prohibit fraud and to protect purchasers of land which is part of a common

promotional scheme. See Kemp v. Peterson, 940 F.2d 110, 112 (4th Cir. 1991); United States v. Steed, 674 F.2d 284 (4th Cir.), cert. denied, 459 U.S. 829 (1982). The language of the Act is meant to be read broadly to effectuate this goal. See McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975). To exclude all but the original developer from the purview of the Act would clearly circumvent its intent by permitting developers to simply transfer land to separate entities before being sold to the public.

HUD's interpretation of the Act as provided in prior cases is instructive. See Markowitz v. Northeast Land Co., 906 F.2d 100, 105 (3rd Cir. 1990)(deference given to an agency's reasonable construction of the statute); Cost

Control Marketing & Management Inc. v. Pierce, 848 F.2d 47 (3rd Cir. 1988)(Congress gave HUD the power to determine whether a seller falls under the Act; therefore, federal court without jurisdiction to issue declaratory relief). In Kemp v. Peterson, 940 F.2d 110 (4th Cir. 1991), we considered the propriety of a district court's order enjoining a developer from future violations of the Act. The case had been filed by the Secretary of HUD against CCMV. Although the case concerned the activities at a different development, the Secretary had exerted his authority to petition the

court to enjoin violations of the Act.[3] Just as in the present case, the developer in Kemp was not the original developer, but rather had purchased its inventory of lots from the original developer as well as individual sellers. The fact that the Secretary brought the action against them is evidence of HUD's view that secondary sellers are developers within the meaning of the Act.

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[3]15 U.S.C. §1714(a) provides for such authority:

Whenever it shall appear to the Secretary that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule or regulation prescribed pursuant thereto, he may, in his discretion, bring an action in any district court...to enjoin such acts or practices....

Lake's argument that it only bought and resold lots in a completed subdivision without making further improvements does not persuade us that it was under no obligation to comply with the registration and disclosure provisions of the Act. See Winter v. Hollingsworth Properties, Inc., 777 F.2d 1444 (11th Cir. 1985)(scope of statute not limited to the sale of "raw" land). First, the land in question was not, in fact, fully developed. On the contrary, there were serious questions concerning the ability of the water supply and sewer system to service all homes in the subdivision. The utility company whose job it was to provide these services is an affiliate of Lake. Moreover, there is no dispute that the Olsens' lot was undeveloped to the extent that it

contained no building at the time it was purchased.

Finally, unlike the cases cited by Lake, e.g. Paquin v. Four Season of Tennessee, Inc., 519 F.2d 1105 (5th Cir. 1975), cert. denied, 425 U.S. 972 (1976); Cumberland Capital Corp. v. Harris, 621 F.2d 246 (6th Cir. 1980), Lake was not merely an incidental player in the Lake Land'Or sales scheme; it was actively involved in the planning and promotion of the development. Given Lake's involvement, we are of the view that it was required to comply with the disclosure and registration provisions of the Act. Because it did not, we affirm the district court's finding of liability to the Olsens.

III.

Lake's second argument is that it is

entitled to exemption from the Act under the exemption from the Act under the exemption for single-family residences, 15 U.S.C. §1702(b)(5). The district court refused to apply the exemption because subsection (G) provides that it applies only where

> there are no offers, by direct mail or telephone solicitation, of gifts, trips, dinners, or other such promotional techniques to induce purchasers or lessees to visit the subdivision or to purchase or lease a lot.

The district court found significant the television commercials' offer of a cash gift to visit the subdivision. It accordingly granted summary judgment to Plaintiff on this issue.

Preliminarily, we recognize the general rule of construction that exemptions from remedial statutes are to

be construed narrowly. See Markowitz v. Northeast Land Co., 906 F.2d 100 (3rd Cir. 1990); De Luz Ranchos Inv. Ltd. v. Coldwell Banker & Co., 608 F.2d 1297 (9th Cir. 1979).

Lake admits that its television advertisement contained an offer of money to visit the subdivision. However, it argues that the Act prohibits mail or telephone solicitation, and does not contemplate television advertising as a form of prohibited solicitation. We are unpersuaded that the omission of television from the subsection by Congress was meant to indicate its approval of its use by developers to induce potential buyers to visit. The Guidelines for Exemptions Available elaborate on the requirements for the

single-family exemption:

> There is no prohibition against using the mails, telephone or other advertising media to promote or advertise the offering or to respond to inquiries from potential purchasers. The only prohibition is that these media cannot contain offers of gifts, trips, dinners or other inducement.

24 C.F.R. §1710, App. A, Part V(e)(2)(ii) (1991). The guideline make clear that some advertising is permissible but that advertising containing inducements is not. Lake contends that by including "other media" in the sentence listing what is permitted and thus affecting, by reference, what is not, HUD impermissibly changed the meaning of the act. Congress imbued HUD with responsibility for administering the Act. 15 U.S.C. §1715(a). We are of the

view that HUD's interpretation of the Act, pursuant to this mandate, is reasonable, and should be upheld to effectuate the Act's purpose. See Markowitz, 906 F.2d at 105.

IV.

For the reasons stated, we affirm the judgment of the district court.

AFFIRMED

Filed: January 13, 1992

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 90-2163(L)
(CA-90-71-R)

Leroy Olsen, et al,

Plaintiffs - Appellees,

versus

Lake Country, Incorporated,

Defendant - Appellant.

ORDER

The Court further amends its opinion filed November 18, 1991, and amended December 9, 1991:

On page 1, section 1 -- the status is changed from "unpublished" to

"PUBLISHED."

On page 2, section 4 -- the status is changed to read "Affirmed by published per curiam opinion."

On page 2, section 6 -- the reference to unpublished opinions being used as precedent is deleted.

For the Court - By Direction

/S/ John M. Greacen
CLERK

Supreme Court, U.S.
FILED
MAR 16 1992
OFFICE OF THE CLERK

(2)

No. 91-1334

In The

Supreme Court of the United States

October Term, 1991

LAKE COUNTRY, INC.,

Petitioner,

v.

LEROY OLSEN and CHERYL OLSEN,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is a case arising under the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701ff (the "Act"), pursuant to which the sale of unimproved lots in interstate commerce is regulated. As stated by the petitioner, the case involves an interpretation of the Act as to whether an entity engaged in the business of buying large numbers of unimproved lots in existing subdivisions and reselling them to the general public using means and instrumentalities of interstate commerce is considered to be a "developer" within the meaning of the Act. A further question is whether the petitioner in the present case, Lake Country, Inc., a Virginia corporation ("Lake") was entitled to an exemption from the provisions of the Act. The Court of Appeals for the Fourth Circuit answered the first question in the affirmative and the second question in the negative.

ARGUMENT

It is not perceived by respondents to be their obligation at this time to respond to arguments which are merely germane to the case, and do not relate to the jurisdictional or discretionary issues which face this Court. Suffice it to say, were *certiorari* to be granted, that respondents would present additional facts and cite other cases relating to the above issues, as well as refuting those cited by petitioner. However, none of these relate to the question of whether this Court should grant a writ of *certiorari* at this time.

None of the cases cited by petitioner, and particularly the cases arising from the various United States Courts of Appeal, are in direct conflict with the decision here. Accordingly, there is no conflict between the circuits, and no basis for a grant of *certiorari* pursuant to Supreme Court Rules, Rule 10.1(a). If there is no conflict among the circuits, then the question for this Court is whether this case presents "an important question of federal law which has not been and should be settled by this Court. . . . " Supreme Court Rules, Rule 10.1(c).

In this connection, the issues raised by petitioner are currently being litigated in other cases involving the petitioner or its affiliates in three District Courts. In the United States District Court for the Western District of Virginia, in a proceeding brought by the United States Department of Justice on behalf of the United States Department of Housing and Urban Development ("HUD") to enforce the applicability of the Act against a corporate affiliate of petitioner, *Jack Kemp v. Cost Control Marketing and Sales Management of Virginia, Inc., et al.*, Civil No. 89-0042-C (W. D. VA), affirmed in part *sub nom Kemp v. Peterson* 940 F.2d 110 (4th Cir., 1991), the court has enjoined further sales by that affiliate without compliance with the Act. Private actions include one case involving the same affiliate of petitioner, presently pending in the United States District Court for the Western District of Virginia under the style *June P. Bailey, et al. v. Cost Control Marketing and Sales Management of Virginia, et al.*, Civil No. 89-0041-C (W. D. VA), in which a class of purchasers has been certified; two cases involving the same issues pending against the petitioner and others before the U.S.

District Court for the Eastern District of Virginia;[1] and four cases involving sales by a second affiliate of petitioner pending before the U.S. District Court for the Middle District of Pennsylvania.[2] All of these cases (other than those in Pennsylvania) have been delayed to a greater or lesser degree by the bankruptcy of two affiliates of petitioner, Cost Control Marketing and Management, Inc., a Pennsylvania corporation, and Cost Control Marketing and Sales Management of Virginia, Inc., a Virginia corporation.

The issues presented in this case will have substantial direct effects on a large number of litigants in the proceedings listed above. There are presently over 800 plaintiffs in the various cases before the various courts; should class certification be granted in the Eastern District of Virginia and the Middle District of Pennsylvania, the number of plaintiffs is expected to increase to between 3,000 and 5,000 families. The three corporations involved had sales in excess of $120,000,000 during their five years of activity. In addition to the cases pending against these three companies, it is believed that HUD has a substantial general interest in these issues and their impact on its

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[1] *Anthony Dryak, et al. v. Lake Country, Inc., et al.*, Civil No. 3: 90-CV-00526 (E. D. VA) and *Danny P. Goldstein, et al. v. Lake Country, Inc., et al.*, Civil No. 3: 91-CV-759 (E. D. VA).

[2] *Lorenzo Acevedo, et al. v. Northeastern Bank of Pennsylvania, et al.*, Civil No. 3: CV-91-1523 (M. D. PA); *Mario Aldini, et al. v. Northeastern Bank of Pennsylvania, et al.*, Civil No. 3: CV-91-1663 (M. D. PA); *Lolita S. Baduria, et al. v. Northeastern Bank of Pennsylvania, et al.*, Civil No. 3: CV-92-0136 (M. D. PA); and *Kenneth Bropson, et al. v. Northeastern Bank of Pennsylvania, et al.*, Civil No. 3: CV-91-0125 (M. D. PA).

regulatory duties. However, in view of the amount of litigation presently in train, in which the issues are likely to be sharpened and clarified, it is questionable whether granting a writ at this time would be appropriate.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted,

LeRoy Olsen and Cheryl Olsen

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